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No. 90-225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SEKOU EALY, infant, by ROBERT EALY and SANDRA EALY, guardians,

Petitioners,

v.

RICHARDSON-MERRELL, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

1. The brief in opposition relies entirely on a gross mischaracterization of the decision below, as illustrated by the Third Circuit's recent decision expressly repudiating the Rule 703 analysis of *Richardson* and of the decision below.

Merrell's suggestion that the court below did not render a Rule 703 decision that is squarely presented for review in this Court, Opp. 2-3, 6-9, is pure fantasy. Merrell opines that "the controlling issue before the court below was . . . not whether the expert opinions on causation were properly admitted," Opp. 8. It claims that the court below proceeded by applying "traditional judgment n.o.v. standards" to "petitioners' admitted evidence," Opp. 3, "reviewing simliar [sic] records" from *Richardson* and other cases, and concluding that "no reasonable juror could find on such a record that Bendectin caused birth defects," Opp. 7. Merrell claims that based on the "*entire* evidentiary record in the case at bar, [the court below] ruled that there was not sufficient evidence to support the jury's verdict," Opp. 3 (emphasis added). *See also infra* note 4. These claims are utterly false.

As should be clear already from our summary of the decision below, Pet. 12-15, which Merrell does not specifically address, the judgment and opinion of the court below rest on a threshold determination (with no deference accorded the trial court) that the trial court erred under Rule 703 in admitting petitioners' expert testimony. The court below granted judgment n.o.v. only after making this admissibility determination, based on the "phantom record" theory and the observation that the Ealys had no other evidence on causation *once the opinion testimony offered by their eight experts had all been ruled inadmissible*. Two separate rulings are therefore contained in the decision

below, and both the Rule 703 issues and the "phantom record" issue posed by the decision are squarely before this Court for review.

The court below could not have been clearer in stating that the *sole* basis of its decision ordering judgment n.o.v. was its separate Rule 703 determination, not any analysis of whether the evidence that the jury actually heard supported the verdict:[1]

*The court below stated that it was applying *Richardson's* "binding rule" that the opinions of petitioners' experts on causation were "without scientific foundation *under Federal Rule of Evidence 703* in the face of 'a wealth of published epidemiological data' to the contrary." 897 F.2d at 1160 (A3) (quoting *Richardson*) (emphasis added).

*The court below followed *Richardson's* approach: "'the *admissibility* of testimony, which is governed by the Federal Rules of Evidence, is the crux of our decision in this case,'" 897 F.2d at 1163 (A11) (quoting *Richardson*) (emphasis added). This was an essential part of the decision below. Because the highest court of the District of Columbia had upheld a $750,000 jury verdict in another Bendectin case[2] on the conclusion that as a matter of *substantive* local law "[t]he same four types of data relied upon by the Ealys" were sufficient

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[1] Merrell's suggestion that the Rule 703 holding of the court below should not be reviewed because the parties and the trial court supposedly never addressed the Rule 703 issue, Opp. 2-3, could not defeat this petition for review of the actual *holdings* of the court below, but in any event is wrong. In fact, Merrell raised Rule 703 in pretrial papers objecting to the admission of petitioners' expert testimony. Pretrial Statement of Defendants Merrell Dow Pharmaceuticals, Inc. and Foer, Inc., April 15, 1986, at 17-19. Merrell reiterated this objection during trial. *E.g.*, Tr. 1205-08 (defense objection to the bases of expert opinion testimony; plaintiffs' answer that "that is the kind of information that experts have been traditionally allowed to rely upon"; and trial court's overruling of objection). Merrell later argued the Rule 703 issue in its appellate brief, expressly citing Rule 703 four times. Brief of Defendant-Appellant, Oct. 25, 1989, at 10, 14 n.1, 31, 46.

[2] *Oxendine* v. *Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100 (1986).

to support a jury verdict, 897 F.2d at 1163 (A10), the Ealys argued that under the *Erie* doctrine a judgment n.o.v. was similarly barred in this diversity case. The court below dismissed this argument on the basis of its square Rule 703 holding: "Contrary to the Ealys' assertions, however, this court is enforcing a *procedural rule governing admissibility*; it is not supplanting substantive state rules on the sufficiency of evidence." 897 F.2d at 1163 (A11) (emphasis added).[3]

*The discussion by the court below of the supposedly overwhelming "wealth" of data, and its comparison to the record in *Richardson*, was expressly *not* — as Merrell would intimate — part of some general holding that reasonable jurors could not rationally choose to believe the Ealys' expert opinion testimony, *if* allowed to hear it.[4] The court "canvass[ed] the probative value of each type of data," as had the *Richardson* court, only because it construed Rule 703 to mandate this inquiry by its requirement "that the grounds relied upon by an expert be of 'a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.'" 897 F.2d at 1161 (A6) (quoting Rule 703). It concluded that "*under Rule 703*, an opinion refuting this scientific consensus is *inadmissible* for lack of an adequate foundation," 897 F.2d at 1162 (A8) (emphasis added). In so doing, because it gave no deference to the trial court's decision to admit expert

[3] *See also* 897 F.2d at 1163 (A11) ("this case, like *Richardson*, turns on the admissibility of the expert testimony"); *id.* at 1164 (A12) ("[o]n this narrow, procedural issue, this case is the same as *Richardson*"). In light of this holding and unambiguous reliance on a purely procedural rule, petitioners abandoned their *Erie* argument and have not presented it to this Court.

[4] Merrell's argument hinges on an initial, flat misstatement of the holding in *Richardson*: "The court in *Richardson* held that, as a matter of law, no reasonable juror could have found *on the evidence presented* that Bendectin caused the plaintiff's birth defects." Opp. 2 (emphasis added). Merrell argues that the court below merely engaged in "routine" review of trial facts to ensure "conformity with precedent," Opp. 1-2, in that it was "confronted with the holding in *Richardson* that no reasonable juror could find on such a record that Bendectin causes birth defects," Opp. 7.

testimony over Merrell's objection, *see supra* note 1, the court below felt free to require that the Rule 703 result be the same as in *Richardson*, despite the sharply different state of the record in this case (Pet. 9 n.3, 12). *See* 897 F.2d at 1162-63 (A9-10).

In an apparently related point, Merrell attempts to distinguish *all* the cases cited in the petition by arguing that "the case at bar arose on review of a motion for judgment n.o.v. and not on review of an evidentiary ruling excluding certain evidence." Opp. 2. Of course, there is no need for a trial court to *exclude* evidence before an appellate court may consider Rule 703. The court below plainly ruled that the trial court's decision *admitting* petitioners' expert opinion testimony was invalid under Rule 703. The decisions cited in the petition involve both admission *and* exclusion of expert testimony under Rule 703, often in tandem with motions for summary judgment or judgment n.o.v.; the sole point relevant to certiorari is that all these decisions — including the decision below — *reach directly conflicting results concerning the purely legal issue of the meaning of Rule 703*.

Perhaps Merrell's point is that the court below did not *limit* itself to a Rule 703 holding: that, instead of ordering a new trial, the court proceeded to order a judgment n.o.v. based on a "phantom record" theory. *See* Pet. 5-6, 14-15. Any suggestion that the court's core decision construing Rule 703 to require exclusion of all of petitioners' expert testimony is thereby somehow *immunized* from review would obviously be insupportable. If the court below had "merely" forced petitioners to face a new trial as a consequence of its Rule 703 decision, there would be no doubt about petitioners' right to seek review on the Rule 703 issues. That the court *also* put itself in conflict with decisions of this Court and other circuits by instead taking the draconian course of granting judgment n.o.v. not on the record *actually* considered by the jury, but on a phantom record

made by deleting all the evidence considered by the jury, simply creates an *additional* and *independent* ground for certiorari. *See* Pet. 22-24.[5] Two asserted wrongs, each meriting review in this Court, do not cancel each other out to somehow make it right to deny review.

Any doubt about the meaning of the opinion below, or about whether there exists a conflict in the circuits over Rule 703, is resolved by the recent decision of the Third Circuit in *DeLuca* v. *Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941 (3d Cir. 1990); 1990 U.S. App. LEXIS 14295 (hereinafter "LEXIS at ___") (decided after the filing of the petition). The *DeLuca* decision, also ruling (as it happens) on a Bendectin case, expressly recognized that both *Richardson and the decision below in this case* turned on Rule 703, and expressly rejected the D.C. Circuit's interpretation of Rule 703.

The *DeLuca* trial court granted summary judgment in favor of Merrell *solely* on its decision to throw out all of plaintiffs' expert opinion testimony, based on Rule 703 — exactly the course followed by the court below in throwing out petitioners' entire case based on *its* Rule 703 decision.[6] The Third Circuit,

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[5] Merrell's argument that this Court should deny review of the "phantom record" issue "because it was never raised below," Opp. 15, is frivolous and again rests on the notion that the court below did not make a Rule 703 decision in the case. Given this Court's ruling in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940) (*see* Pet. 5, 23), petitioners had every reason to expect that consideration of Merrell's request for judgment n.o.v. would take into account *all* the evidence presented to the jury, and Merrell's theory that trial counsel should have acted differently, Opp. 14-15 n.10, is absurd. Even *Richardson* did not suggest that a trial court *denial* of judgment n.o.v. could be upset on the "phantom record" theory, see Pet. 11-15, and therefore review of the novel decision of the court below on this point is entirely proper. Petitioners had no obligation to present a petition for rehearing on the issue as a condition of seeking certiorari.

[6] The *DeLuca* trial court cited *Richardson* and held that Rule 703 was not met, given the *weight* of Merrell's competing evidence. *DeLuca* v. *Merrell Dow Pharmaceuticals*, 131 F.R.D. 71, 72, 74 (D.N.J. 1990). The trial court reached this conclusion "despite the fact that most of the data relied upon by [the expert] was data from peer reviewed articles in medical journals" relied

decisively reaffirming its landmark Rule 703 decision, *In Re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3rd Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) (*see* Pet. 15-17), reversed the trial court. It ruled that such focus on the *weight* of the testimony — which it expressly recognized was the basis of the D.C. Circuit's decisions in both *Richardson* and in *this* case, *see* LEXIS at 29-30 — is legally irrelevant to the inquiry mandated by Rule 703. LEXIS at 35-41.[7] The Third Circuit repudiated the reasoning of *Richardson* and *Ealy*:

> [W]e do not view the absence of statistically significant findings or the great weight of contrary opinion as being relevant to the Rule 703 question posed here. *Rule 703 is satisfied once there is a showing that an expert's testimony is based on the type of data a reasonable expert in the field would use* in rendering an opinion on the subject at issue; it does not address

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upon by Merrell's own expert, and despite the fact that neither Merrell nor the trial court identified *what* "data experts in the field would have considered unreliable." LEXIS at 5, 7. Instead the *DeLuca* trial court made its Rule 703 ruling based on Merrell's recitation of "the great weight of scientific opinion in its favor" as revealed in "the case law cited by Merrell," LEXIS at 5, 7. The Rule 703 reasoning was therefore *identical* to that of the decision below in this case.

[7] It reiterated that "Rule 703 has a narrow function" and only "seeks to delimit the acceptable *bases* for expert testimony"; that Rule 703 "requir[es] the district court to 'make a factual inquiry . . . as to what data *experts* in the field find reliable' "; that " '[t]he proper inquiry is not what the court deems reliable, but what experts in the relevant discipline deem it to be' "; and that Congress intended Rule 703 "to broaden and liberalize the permissible bases for expert testimony." LEXIS at 35-36 (citations omitted) (emphasis added). The Third Circuit also reiterated that trial court decisions on whether to admit evidence under Rule 703 are entitled to deference on appeal. LEXIS at 8-9.

> the reliability or general acceptance of an expert's methodology.

LEXIS at 38 (emphasis added).

Despite the *DeLuca* court's total renunciation of the approach to Rule 703 taken in *Richardson* and in the decision below,[8] Merrell simply ignores the *DeLuca* court's analysis of Rule 703, and touches only on irrelevant procedural details. Opp. 9-10. Merrell's attempt to deny the conflict depends entirely on its basic strategy of attempting to characterize the decision below as not involving a Rule 703 determination at all.

2. The intrinsic importance of the issues presented for review, and the conflicts over them, are conceded.

Merrell nowhere disputes either the importance of the issues raised in the petition or the circuit conflicts over those issues. The petition carefully documented that, preexisting the decision below, there has existed an "intractable, multi-Circuit split, dating to 1983," over the proper construction of Rule 703 — "an enactment of Congress specifically designed to provide a nationally uniform rule of procedure" and "an enactment relevant to virtually *every* federal trial involving expert testimony." Pet. 4 (emphasis in original). Four circuits insist that under Rule 703 the *only* question is what types of data

[8] *DeLuca* is by no means alone in rejecting the view of Rule 703 taken in *Richardson* and in the decision below. *E.g.*, *Longmore* v. *Merrell Dow Pharmaceuticals, Inc.*, 737 F. Supp. 1117, 1118, 1120 (D. Idaho 1990) (rejecting *Ealy's* theory that under Rule 703 defendants may employ supposedly "overwhelming" statistical data in order "to bulldoze aside the plaintiffs' experts"); *In re Bendectin Products Litigation*, 732 F. Supp. 744, 749 (E.D. Mich. 1990) (decision of Judge Rubin, who presided over the multidistrict litigation cited in Opp. 16, denying a Bendectin summary judgment motion based on Rule 703 because "[a] trial court must not substitute its views as to what constitutes reasonable reliance for those of the experts in the field").

experts *actually* rely upon and regard as reasonable; six circuits, to varying degrees, permit judges to inject their *own* views about the reasonableness of such reliance. Pet. 15-19. The decision below, and now the *DeLuca* decision, only add to the longstanding conflict.

Merrell denies none of this analysis. Nor does it deny the existence of a sharp split in the circuits over the basic standard of review for trial court rulings under Fed. R. Evid. 104(a) on the admission of expert testimony, Pet. 19-22, nor does it deny that the "phantom record" theory "flouts settled law and is in conflict with a decision of this Court and flatly contradicts holdings in similar cases in two circuits." Pet. 22.

On each legal issue covered in the petition, the reason offered for why review should be denied is the same: the decision below does not present these issues. Because that claim is patently untrue, *see supra* pp. 1-5, the case for review is clear.

3. That the underlying litigation here happens to involve a Bendectin tort claim is utterly irrelevant to the purely legal issues presented.

Merrell's puzzling opening observation that "[t]his is the third time in the past year that this Court has been asked to grant certiorari in a Bendectin case," and Merrell's observation that this petition should be denied because *those* petitions were denied, Opp. 1, are both inaccurate and irrelevant.[9] This Court

[9] The point is inaccurate because Merrell omits to mention that certiorari was also denied on the petition *it* filed seeking review of the $750,000 judgment entered against it in the *Oxendine* case, *supra* note 2. That petition was denied on February 20, 1990. 110 S. Ct. 1121 (1990). Of course, as this Court observed long ago: "The denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times." *United States* v. *Carver*, 260 U.S. 482, 490 (1923). Moreover, none of *those* petitions focused on the issues presented by *this* petition. *See also* Pet. 11.

exercises its certiorari jurisdiction to resolve important issues of federal law where they are properly presented, regardless of the type of case in which those issues happen to arise. This is no more a "Bendectin case" than *Hickman* v. *Taylor*, 329 U.S. 495 (1947), was a "tugboat case," *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), a "railroad case," or *I.N.S.* v. *Chadha*, 462 U.S. 919 (1983), an "immigration case." The decision below raises important issues of federal evidence law and civil procedure — issues that are purely legal, that apply across all civil litigation, and that do not require scrutiny of statistical or other evidence bearing on the causation question in Bendectin trials. Merrell's focus on the body of evidence supposedly vindicating its views on the merits, *e.g.*, Opp. 3-4, 12, 16; *see also* Pet. 8-9, has been rejected by many courts, but is completely irrelevant to the issues raised by this petition and will not be addressed here.

The only reason the petition even touched on the nature of the causation evidence presented at trial was "to enable the Court to satisfy itself that the questions on which petitioners seek review are ones on which conflicts of substance exist" because other circuits would have ruled differently, Pet. 6. Merrell conceded at trial, and still concedes, that the material considered by petitioners' experts is normally relied on by experts in the field, and that these experts consider it reasonable to so rely.[10] Under the law of the First, Third, Fourth, Sixth, Seventh and Eighth Circuits, Rule 703 would therefore require admission of this testimony, and only the jury would weigh the evidence. Pet. 17-18. Only under the law of the Second, Fifth, and Tenth Circuits — and, most radically, of the D.C. Circuit — is it permissible for courts to employ Rule 703 as

[10] Merrell nowhere disputes the fact that, as fully documented in the petition, "[t]hroughout the trial, it was uncontested that all four types of information from which both sets of experts were forming opinions are normally and reasonably relied upon by competent researchers" in examining Bendectin causation. Pet. 9.

a means of engaging in their *own* weighing of the evidence. Pet. 18-19.

CONCLUSION

As the Third Circuit's *DeLuca* decision makes plain, the sharp division among the circuits over the basic meaning of Rule 703, a provision that is integral to much federal civil litigation, continues. The Third Circuit first held in 1983 that Congress's language and purpose in enacting Rule 703 does not permit the construction of that rule embraced by the decision below. Now it has reaffirmed that view, expressly disagreeing with the holding below. Eight other circuits have also weighed in. *Whichever* approach to Rule 703 is correct, it is clear that Congress enacted the Rules of Evidence for the purpose of ensuring that trials are conducted in a *uniform* manner. Pet. 19. It is intolerable, on an issue this basic, for the fate of litigants in similar cases to turn on the circuit in which they happen to reside. This Court should issue a writ of certiorari to bring an end to this longstanding conflict, and to resolve the other issues presented by this case.

Respectfully submitted,

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